UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re EXPRESS SCRIPTS, INC., PBM LITIGATION	)	
	)	**Master Case No. 4:05-MD-01672-SNL**

This Document Relates to:

RICHARD LANIGAN, Trustee on behalf of **LOCAL 153 HEALTH FUND**, and all other similarly situated Employee Benefit Plans,
Plaintiff,

vs.

EXPRESS SCRIPTS, INC., and **ESI MAIL PHARMACY SERVICES, INC.**,
Defendants.

Member Case No. 4:05-CV-00862 SNL

MEMORANDUM

Express Scripts, Inc. and its related entities are defendants in several interrelated cases consolidated for coordinated pre-trial proceedings by the Judicial Panel on Multi-District Litigation ("MDL"). In the instant matter, Plaintiff brought this lawsuit asserting, in part, claims arising under the Employment Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. § 1001, *et seq*. This matter comes before the Court on Defendants' motion to dismiss (No. 4:05-CV-00862, Doc. # 8, filed Jul. 26, 2005), wherein Defendants Express Scripts, Inc. ("ESI") and ESI Mail Pharmacy Services, Inc. ("ESI Mail") move the Court to dismiss Plaintiff's complaint for (I) lack of subject matter jurisdiction, and (II) failure to state a claim upon which relief can be granted.

Upon review of this matter, Defendants' motion to dismiss is **HEREBY GRANTED IN PART**. The analysis as follows.

BACKGROUND

This suit is a consolidated putative class action brought by the trustee of Local 153 Health Fund on behalf of the fund, and all other similarly-situated funds which utilize (and/or have utilized) Defendants' services as a Pharmaceutical Benefits Manager ("PBM"). For purposes of the instant motion, the Court provisionally takes notice of the following:

ERISA

The Office of Professional Employees International Union ("OPEIU") established Local 153 Health Fund, an ERISA plan,[FN1] for purposes of providing benefits to some 145,000 of its members. Participating employers, providing a self-funded prescription drug plan, make deposits into a trust fund (like the one at bar), for the subsequent payment of employees' drug claims.

In response to growing concern over the improper administration and management of employee benefit plans, and to regulate the conduct of plan employers, administrators, and/or "fiduciaries," Congress enacted ERISA. 29 U.S.C. § 1001(a)-(b). *See, e.g.*, *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989) ("ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits."); *Carpenters Local Union No. 26 v. United States Fidelity & Guaranty Co.*, 215 F.3d 136, 141 (1st Cir. 2000) (ERISA's regulatory scheme is premised on defining critical players as fiduciaries, imposing fiduciary obligations on them, and penalizing them for their failure to comply.). In affording "employees enhanced protection for their benefits," Congress equally intended to prevent against "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). In that way, ERISA's "preemption clause" protects against "a multiplicity of regulation" by eliminating any and all state law claims which "relate to" an ERISA plan (*see* "Discussion" *infra*). *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995).

> **FN1**. ERISA defines "employee welfare benefit plan" to be any plan, fund, or program established by an employee organization to the extent such plan was established or is maintained for the purpose of providing for its participants or their beneficiaries [certain benefits]. 29 U.S.C. § 1002(1). Whether an entity is an ERISA plan is a mixed question of fact and law. *Bannister v. Sorenson*, 103 F.3d 632, 636 (8th Cir. 1996) (To qualify as an ERISA plan, "a reasonable person must be able to 'ascertain the intended benefits, a class of beneficiaries, source of financing, and procedures for receiving benefits.' ") (quoting *Northwest Airlines, Inc. v. Federal Ins. Co.*, 32 F.3d 349, 354 (8th Cir. 1994)). Here, the status of Local 153 as an ERISA plan has been sufficiently pled.

The PBM

On behalf of its members, Local 153 Health Fund contracted with National Prescription Administrators, Inc. ("NPA") for PBM services. Specifically, Local 153 delegated and relied upon NPA to manage and administer its prescription drug benefits, and thereby provide prescription drugs at the lowest prices. When Defendants purchased NPA in April of 2002, they assumed NPA's contractual obligations to serve as PBMs to Local 153, and did so serve until approximately December of 2003.

"PBMs are the 800-pound gorillas of pharmaceutical reimbursement." *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D 61, 71 (D.Mass. 2005). PBMs operate as third-party administrators; hired to design, manage, and administer prescription drug benefit programs; e.g., establish relationships and negotiate with drug manufacturers, establish pharmacy networks for dispensing drugs, determine coverage eligibility and co-payments, manage formularies and formulary compliance, and operate mail order prescription and specialty drug dispensaries.

In recent years, Defendants "substantially expanded through the acquisition of [sic] PBMs." In particular, their acquisition of NPA armed Defendants with the "largest privately-held, full-service PBM," managing approximately $2.5 billion in annual drug spending in the Northeast. As the third largest PBM in North America, overseeing the pharmacy benefits of over 50 million people, and processing hundreds of millions of claims each year; Defendants' presence in the pharmaceutical industry is well-established. Purportedly, "[m]ore than 56,000 retail pharmacies, representing more than 99% of all United States retail pharmacies, participate in one or more of ESI's networks."

Due to Defendants' semblance of size and power, and their promise of mitzvah, plan sponsors presuppose and rely upon Defendants to be better than they at the management and cost-reduction of pharmacy benefits. *See, e.g.*, No. 4:05-MD-01672, Doc. #277 at ¶8, filed Dec. 28, 2007 ("It is generally understood and expected that entities that provide health benefits to their members or employees do so in an effort to reduce health care costs."); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) ("PBMs manage prescription drug benefit programs and seek to reduce their clients' drug costs by pooling claims and negotiating volume discounts with pharmaceutical companies."). This reliance and delegation by a vast number of health plans, enable Defendants to exert competitive pressure on drug manufacturers (seeking to include their respective drugs on Defendants' formularies), and

on retail pharmacies (maneuvering to participate in Defendants' network). However, rather than utilize this "competitive pressure" in a manner so as to obtain lower costs, and/or otherwise maximize plan benefits; Defendants allegedly manipulated retailers and manufacturers to (among other things) take part in an underhanded scheme directed at misappropriating certain monies, to which Plaintiff now claims title.

Defendants' [Alleged] Improper Acts/ Omissions

In providing PBM services to Plaintiff, Defendants conducted themselves in a manner contrary to their stated objective, i.e. reducing costs; and instead, engaged in a series of unlawful acts and/or omissions, which inflated the costs of pharmacy benefits, improperly steered plan participants toward certain drugs, and violated the participants' privacy. Specifically, Plaintiff alleges as follows:

> *(a) Retaining Undisclosed Rebates from Manufacturers*. Defendants leveraged their buying power to negotiate favorable discounts, rebates, and other amounts from drug manufacturers; which undisclosed amounts were then retained.
>
> *(b) Enriching Itself By Creating a Differential or "Spread" in Dispensing Fees and Discounts*. Retail pharmacy prices are based on the wholesale drug price and a dispensing fee charged by the pharmacy. Defendants negotiated discounted drug rates and dispensing fees, yet failed to pass or disclose all such amounts to Plaintiff.
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> *(c) Enriching Itself through Favoring Specific Drugs and "Switching."* Defendants retained undisclosed kickbacks from drug manufacturers in exchange for listing their drugs on formulary (the preferred medication list), or "switching" plan participants to certain drugs.
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> *(d) Enriching Itself through Circumventing "Best Pricing" Rules*. Defendants assisted manufacturers to distort and/or artificially inflate the average wholesale prices ("AWPs") of their respective drugs.
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> *(e) Enriching Itself with Undisclosed Bulk Purchase Discounts on Mail Order Prescriptions*. Defendants received bulk purchase and/or prompt payment discounts from manufacturers, and failed to pass along (or disclose) such amounts to Plaintiff.
>
> *(f) Accounting Errors*. Defendants caused accounting errors by (i) paying claims outside eligibility; paying duplicate prescriptions; making erroneous dosing criteria; paying prescriptions outside refill parameters; making "dispense as written" errors; making prior-authorization errors; and making system-edit errors.

FN2. In re Express Scripts, Inc., Pharmacy Benefits Management Litigation, No. 4:05-MDL-01672, filed Apr. 29, 2005.

CHOICE OF LAW

Unlike the master case[FN2] and several other member cases transferred to this Court from the United States District Court for the Southern District of New York, the instant case was filed directly in the Eastern District of Missouri on the basis that "Defendants' liability arose in this Judicial District and/or a substantial part of the events and conduct giving rise to the violations of law asserted herein occurred in this Judicial District." *See* 29 U.S.C. § 1132(e)(2) (ERISA action may be brought where (i) plan was administered, (ii) breach took place, or (iii) defendant resides or may be found.). Plaintiff further alleges proper venue in that "all related cases against these PBM defendants [were] transferred to this Court..." *See* 28 U.S.C. § 1391(a)-(b). While Plaintiff may have filed directly into the Eastern District of Missouri so as to eliminate some of the administrative inefficiencies associated with MDL, *see, e.g.*, *In re Vioxx Products Liability Litigation*, 478 F.Supp.2d 897, 904 (D.La. 2007)[FN3]; 28 U.S.C. § 1407; before the Court turns to its substantive analysis, it must address the choice of law issue.

Where federal questions are at issue, "consolidated cases are controlled by the law of this circuit, rather than that of the various circuits in which they were first filed." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 n.4 (8th Cir. 1998). Accordingly, in dealing with federal questions, the Court will apply Eighth Circuit precedent.

As to state substantive law issues, a transferee court "must apply the choice of law rules of the jurisdiction in which each case was originally filed." *Van Dusen v. Barrack*, 376 U.S. 612, 638-39 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516, 524-26 (1990). Here, the complaint was filed in the Eastern District of Missouri; accordingly, this Court shall apply Missouri choice of law principles. *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

FN3. "Direct filing into the MDL avoids the expense and delay associated with plaintiffs filing in local federal courts around the country after the creation of an MDL and waiting for the Panel to transfer these 'tag-a-long' actions to this district." *In re Vioxx*, 478 F.Supp.2d at 904.

Missouri courts apply the "most significant relationship" test for both tort and contract claims. *Rotskoff v. Cooley*, 438 F.3d 852, 855-56 (8th Cir. 2006) (tort claims); *Sheehan v. Northwestern Mut. Life Ins. Co.*, 44 S.W.3d 389, 396 (Mo.App. 2000) (contract claims); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 & 188 (1971). Applied to the case at bar, the Court finds that New York law governs Plaintiff's state law claims.[FN4]

DISCUSSION

In passing on a motion to dismiss under Rule 12(b), the court must take all factual allegations in plaintiff's complaint as true, view the complaint in the light most favorable to plaintiff, and dismiss the action only if the complaint demonstrates on its face that there is an insurmountable obstacle to relief. *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993); FED R. CIV. P. 12(b).

I. RULE 12(b)(1)

Defendants move to dismiss Plaintiff's complaint, pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction. Unlike state courts, federal courts are courts of limited subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Federal courts may exercise power over a cause of action only where it has been granted by the Constitution or authorized by statute. *Id*. The presumption is that a cause lies outside of the court's limited jurisdiction, until proven otherwise by the party asserting its jurisdiction. *Id*. Further, to avoid dismissal under the Federal Rules, a party seeking the court's judgment must include in her complaint an affirmative allegation demonstrating the court's basis for jurisdiction. FED. R. CIV. P. 8(a).

> **FN4**. As to the alleged claims arising in tort, the facts give rise to the following: (a) the injury occurred in New York, in that Plaintiff (i) purchased pharmaceutical drugs in New York, (ii) was billed in New York, and (iii) was injured by Defendants' misappropriation of certain assets which accrued in New York. Next, (b) the alleged conduct causing the injury presumably occurred in both Missouri and New York; in that Defendants maintain their principal places of business and corporate presence in Missouri and New York, respectively. As to (c) the parties' residences/ places of business, Plaintiff resides and principally conducts business in New York, and presumably represents the interests of plan members domiciled in New York; while both Defendants reside and principally conduct business in Missouri. Lastly, the Court finds that (d) the parties' relationship is centered in New York, in that Defendants provide PBM services to New York plan participants and beneficiaries.
>
> As to the contract claims, the Court considers (a) & (b) the parties' place of contracting and/or negotiation to be "purely fortuitous and [to] bear[] no relation

> to the parties and the contract." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e (1971). The contract was originally entered into as between Plaintiff and NPA. Although the contractual obligations were later (allegedly) assumed by Defendants, the place of negotiation/ execution was not "chosen" by the parties to this litigation, and will not factor into the Court's judgment. *See id*. Next, (c) the performance was to take place, and (d) the contract's subject matter was located, in New York. Specifically, the contract's purpose was for Defendants, hired as PBMs, to provide pharmacy plan benefits to certain members and retirees of an employee union. Plaintiff principally conducts business in New York; therefore, presumably, the members of the plan (i) purchased pharmaceutical drugs in New York and (ii) were billed in New York. Lastly, as previously stated, (e) Plaintiff and Defendants reside in New York and Missouri, respectively.
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> In light of the foregoing, Plaintiff's state and common law claims shall be governed by New York law.

Here, Plaintiff's first alleged jurisdictional basis is ERISA's statutory grant, 29 U.S.C. § 1132(e)(1), which confers district courts with exclusive subject matter jurisdiction over certain claims thereunder. Alternatively, Plaintiff alleges jurisdiction pursuant to 28 U.S.C. § 1331, which authorizes subject matter jurisdiction over "federal questions." Lastly, Plaintiff asserts this Court's supplemental jurisdiction over its state and common law claims, pursuant to 28 U.S.C. § 1367(a). Once *any* of Plaintiff's claims come within the original jurisdiction of the Court, jurisdiction will be proper as to *all* claims. *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983). That having been said, if the Court is without subject matter jurisdiction under both Sections 1132(e)(1) and 1331, the federal and state law claims must be dismissed entirely.

A. 29 U.S.C. § 1132(e)(1)

Under ERISA, district courts have original subject matter jurisdiction over civil actions brought by fiduciaries (among others). In their motion, Defendants properly state that Plaintiff Local 153 Health Fund, an ERISA plan, is not (or has not sufficiently established its status as) a fiduciary or other "enumerated party" under Section 1132(a);[FN5] therefore, jurisdiction could not be predicated upon the same.

> **FN5**. Specifically, 29 U.S.C. § 1132(e)(1) confers exclusive subject matter jurisdiction over ERISA actions brought by "the Secretary or by a participant, beneficiary, fiduciary..." This Court recently held that Local 153 Health Fund is not, *per se*, an enumerated party entitled to bring suit. (*See* Doc. #274.) Furthermore, since Local 153 Health Fund had failed to prove that it was a *de facto* "enumerated party," this Court was without jurisdiction to proceed to the merits of Plaintiff's claims.

Subsequent to the Court's Order (Doc. #274, *supra* note 5), granting leave to amend its complaint; Plaintiff named Richard Lanigan as a party to the action. As stated, this Court has jurisdiction over a civil action instituted by an ERISA fiduciary. 29 U.S.C. § 1132(a) &(e); *supra* note 5. For purposes of the instant motion, the Court is satisfied that Mr. Lanigan comes within ERISA's definition of "fiduciary," considering his governance (as trustee and officer) of the plan. *See* 29 U.S.C. § 1002(21)(A); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (ERISA defines "fiduciary" as one who acts in the capacity of manager, administrator, or financial adviser to a plan.).

Thereupon, Plaintiff Richard Lanigan, on behalf of Local 153 Health Fund, is an enumerated party pursuant to Section 1132, and the Court's jurisdiction is proper. Accordingly, Defendants' motion to dismiss pursuant to Rule 12(b)(1) is **HEREBY DENIED**, as moot.

II. RULE 12(b)(6)

Under the Federal Rules, a district court may dismiss any complaint which fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Taking all facts contained in plaintiff's complaint as true, defendant is afforded an opportunity to test the sufficiency of plaintiff's claims, as a matter of law. Under this standard, a complaint should be dismissed only if it appears that plaintiff can prove no set of facts[FN6] which would entitle her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Here, Defendants' basis for dismissal is twofold. First, Defendants claim that Plaintiff's state and common law claims[FN7] are entirely preempted by ERISA. Next, Defendants seek dismissal of Plaintiff's claims on independent grounds.

FN6. At this stage in the litigation, specific facts are not necessary to survive a motion to dismiss. The federal "notice-pleading" rules require "a short and plain statement of the claims," FED. R. CIV. P. 8; to impart defendant with fair notice of the claims, and the grounds upon which they rest. *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007).

FN7. Plaintiff's complaint originally alleged negligence and violation of New York Public Health Law, *see* No. 4:05-CV-00862, Doc. #1, filed May 27, 2005. However, these claims are not included in Plaintiff's amended complaint, shall not be discussed in the Court's opinion, and shall hereafter be **DISMISSED *WITHOUT PREJUDICE***. *See* FED. R. CIV. P. 41(a).

A. ERISA PREEMPTION

Defendants move the Court to dismiss Plaintiff's state and common law claims in that they are preempted by ERISA. In response, Plaintiff urges that ERISA preemption does not apply to claims asserted against third-party administrators, and because its claims do not "relate to" an ERISA plan.

i. Complete Preemption, 29 U.S.C. § 1132(a)

Where Congress grants exclusive subject matter jurisdiction to federal courts, complete preemption serves as an exception to "the well-pleaded complaint rule," wherein a federal court may satisfy its own jurisdictional requirements by looking past plaintiff's complaint to the essential nature of her suit. *Lyons v. Phillip Morris, Inc.*, 225 F.3d 909, 912 (8th Cir. 2000). Thus, even where a plaintiff brings an action in state court, and/or alleges solely state law claims; this express grant of exclusive subject matter jurisdiction operates to transform her claims into ones federal in nature, thus triggering federal "arising under" jurisdiction, and necessitating the action's removal to federal court. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207-08 (2004) *(*citing *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003)); *Lundeen v. Canadian Pacific Ry. Co.*, 447 F.3d 606, 611 (8th Cir. 2006) (citing *Gaming Corp. of Am. v. 12 Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996)). *See also Lyons*, 225 F.3d at 912 (" 'Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.' ") (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)).

Relevant here, Section 1132 states that "a civil action may be brought by [certain enumerated parties]." 29 U.S.C. § 1132(a). Furthermore, district courts "shall have exclusive jurisdiction" over ERISA actions alleging breach of fiduciary duty. *Id.* § 1132(e). The instant action was instituted in Federal Court by an ERISA fiduciary, and Plaintiff's complaint alleges at least one claim expressly afforded by ERISA's remedial scheme, e.g., breach of fiduciary duty. Therefore, the Court has jurisdiction pursuant to Section 1132, and complete preemption does not apply.

ii. Express Preemption, 29 U.S.C. § 1144(a)

The provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). In

accord with its stated objective- to encourage employers' establishment of, and contributions to, employee welfare benefit plans; and to guard against the imposition of inconsistent and/or unreasonable costs- Congress expected ERISA to serve as comprehensive regulation of employee benefit plans, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). To that end, ERISA's provisions preempt any action brought under state or common law which "relates to" an ERISA plan. 29 U.S.C. § 1144(a); *Parkman v. Prudential*, 439 F.3d 767, 771 (8th Cir. 2006) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983)).

That having been said, ERISA's preemptive force is not without limitation. Notably, ERISA expressly preserves a citizen's rights under State laws which "regulate insurance, banking, or securities," 29 U.S.C. § 1144(b)(2)(A)); or affect ERISA plans in a manner "too tenuous, remote, or peripheral," *Shaw*, 463 U.S. at 100 n. 21.

Historically, ERISA's preemption clause has been afforded broad application; while, in contrast, the saving clause has enjoyed "narrow compass indeed." *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' ") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990) ("preemption clause" is "conspicuous for its breadth."); *Shaw*, 463 U.S. at 99 (ERISA's preemptive force is " 'intended to apply in its broadest sense to all actions of state or local governments' " and to " 'reserv[e] to Federal authority the sole power to regulate the field of employee benefit plans.' ") (quoting 120 CONG. REC. 29197, 29933 (1974) (statements of Reps. Dent and Williams)).

More recently, courts have grown "more guarded" of ERISA's preemptive span, specifically in the field of healthcare. *Carpenters*, 215 F.3d at 140 (ERISA's "relate to" language "cannot be read literally. 'If [it] were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course....' ") (quoting *Travelers*, 514 U.S. at 655); *Travelers*, at 654, 661 ("...unless congressional intent to preempt clearly appears, ERISA will not be deemed to supplant state law in areas traditionally regulated by the states . . . nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern."); *accord, e.g.*, *Pegram v. Herdrich*, 530 U.S. at 211, 237 (2000) ("in the field of health care, a subject of traditional state regulation, there is no ERISA preemption without clear

manifestation of congressional purpose."); *Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294, 301 (1st Cir. 2005).

The "Relate To" Test

A deficient model of clarity, today's express preemption analysis involves the interpretation of Section 1144(a)'s "relate to" language, in tandem with legislative intent. *Wilson v. Zoellner*, 114 F.3d 713, 717 (8th Cir. 1997) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 325 (1997)). *See Carpenters*, 215 F.3d at 139-40 (The *Travelers* Court signaled the analytic shift from strict construction toward a more practical approach premised on congressional intent.) (citing *Travelers*, 514 U.S. at 654, 655; *and Dillingham*, 519 U.S. at 324-25). Within this framework, a state action "relates to" an ERISA plan if it (1) makes "reference to," or (2) has a "connection with," such a plan. *Parkman*, 439 F.3d at 771 (citing *Dillingham*, 519 U.S. at 324).

a. "Reference To"

Where a state law "functions irrespective of the existence or non-existence of an ERISA plan," it makes no "reference to" an ERISA plan. *See Carpenters*, 215 F.3d at 144. Here, each of the state and common laws at issue do not (i) impose requirements on ERISA-covered programs; (ii) exempt ERISA plans from their provisions; (iii) premise a claim or their own operation on the existence of ERISA plans; or (iv) act immediately and exclusively upon ERISA plans. *See Dillingham*, 519 U.S. at 324-25 (internal citations omitted). *Accord Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr.*, 154 F.3d 812, 821 (8th Cir. 1998) (internal citations omitted).

Accordingly, this Court finds that Plaintiff's state and common law claims "neither single[] out ERISA plans for special treatment nor depend[] on their existence as an essential part of [their] operation" and are "indifferent to . . . ERISA coverage. It is properly classified, therefore, as 'one of myriad state laws of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *Carpenters*, 215 F.3d at 145 (quoting *Dillingham*, 519 U.S. at 334; *and De Buono v. NYSA-ILA Med. & Clin. Servs. Fund*, 520 U.S. 806, 815 (1997)) (internal citations and quotations omitted).

b. "Connection With"

In *Arkansas Blue Cross & Blue Shield*, the following factors were identified in assessing whether a state law has a "connection with" an ERISA plan: (1) whether the law negates a plan provision, (2) whether the law affects relations between primary ERISA entities, (3) whether the law impacts the structure, administration, and/or economic status of plans, (4) whether preemption is consistent with other ERISA provisions, and (5) whether the law is an exercise of traditional state power. 947 F.2d 1341, 1344-45 (8th Cir. 1991) (internal citations omitted); *accord Wilson*, 114 F.3d at 717. *C.f. Bannister v. Sorenson*, 103 F.3d 632, 636 (8th Cir. 1996) (These factors "are not themselves a magic formula for determining preemption, and our main task is to determine 'the totality of the state [law's] impact on the plan.' ") (quoting *Arkansas Blue Cross Blue Shield*, 947 F.2d at 1345).

ERISA Fiduciary

Before addressing whether Plaintiff's claims have a "connection with" an ERISA plan, the Court draws attention to a recent line of cases which held that ERISA did not preempt state law claims asserted against a third-party service provider. *See, e.g., Rowe*, 429 F.3d at 301-05 (state law imposing fiduciary duty on PBMs was not preempted because PBMs were not fiduciaries under ERISA, and the state law did not "relate to" an ERISA plan or conflict with ERISA's exclusive remedial scheme.); *Seaway Food Town, Inc. v. Medical Mutual of Ohio*, 347 F.3d 610, 617-19 (6th Cir. 2003) (plan administrator was not an ERISA fiduciary where it lacked discretion over the acts alleged); *Bickley v. Caremark Rx, Inc.*, 361 F.Supp.2d 1317, 1330, 1338 (D.Ala. 2004) (PBM is only a fiduciary with respect to discretionary acts), *aff'd on other grounds*, 461 F.3d 1325 (11th Cir. 2006). *Compare Glanton*, 465 F.3d at 1124 (PBM was ERISA fiduciary exercising control, authority, and/or discretion over plan assets when choosing whether to fill a prescription or shift a participant to a different drug.), *cert. denied*, 128 S.Ct. 126 (2007).

See also, e.g., Martin v. Feilen, 965 F.2d 660, 669 (8th Cir. 1992) (professionals performing only ministerial accounting functions for plan were not fiduciaries); *Consolidated Beef Ind., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964-56 (8th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) (same); *Kerns v. Benefit Trust Life Ins.* Co., 992 F.2d 214, 217 (8th Cir. 1993) (same); *Board of Trustees of Western Lake Superior Piping Industry Pension Fund v. American Benefit Plan Adm'rs, Inc.*, 925 F.Supp. 1424, 1429-30 (D.Minn. 1996) (Third party administrator

was not ERISA fiduciary where it operated under the strict supervisory requirements of employer and plan documents, and where no facts established its discretion over the acts alleged.).

The instant case is distinguishable from this line of precedent in that Defendants retained and exercised full discretion and/or control over their commission of the alleged acts. *See, e.g., Kuhl v. Lincoln Nat'l Health Plan,* 999 F.2d 298, 302-03 (8th Cir. 1993), *cert. denied,* 510 U.S. 1045 (1994); *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Brotherhood Labor Leasing,* 950 F.Supp. 1454, 1460 (D.Mo. 1996) ("claims in judicial actions, based upon state law, that are brought by or against third parties over the execution of plan trustees' duties also 'relate to' the operation of the plan and are therefore [sic] preempted by ERISA.").

While the Court tends to agree that "[a]lthough ERISA prescribes the duties that are owed by ERISA entities to one another, and prescribes remedies for their breach, it is not designed to regulate or afford remedies against entities that provide services to plans," *Pharmaceutical Care Management Ass'n v. Rowe,* No. Civ. 03-153, 2005 WL 757608, at *9 (D.Me. Feb. 2, 2005); *accord American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F.Supp. 60, 69 (D.Mass. 1997); the instant facts sufficiently establish that Defendants fully assumed the responsibilities of, and were operating as, plan fiduciaries. *See Dudley Supermarket, Inc. v. Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 3 (1st Cir. 2002) ("There can be no doubt that if [plaintiff's] purported state law claims in fact charged [defendant] with breach of fiduciary duty while acting as an ERISA fiduciary, ERISA would preempt completely their claims which thus would have to be asserted, if at all, under ERISA.").

Moreover, the facts establish that Defendants were hired to assume all discretionary aspects relating to the management and administration of the subject plan, and the improper acts constituting each of Plaintiff's claims involve Defendants' purported misuse of their discretion and/or control over the plan. Therefore, while Plaintiff urges the Court to exclude third-party administrators from ERISA's preemptive reach; such a holding would contradict its entire purpose. Afterall, ERISA's regulatory scheme would be rendered obsolete if plan sponsors could entirely transfer their duties to third parties, and the latter would be subject to a separate and varying standard of enforcement. Consequently, the Court must apply ERISA's functional approach in assessing which of Defendants' purported acts were fiduciary in nature. *See, e.g., Pegram,* 530 U.S. at 226 ("In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide

services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-47 (2d Cir. 1989) ("The question once again becomes whether a particular activity involves plan management or administration."); *Prudential Ins. Co. of America v. Doe*, 46 F.Supp.2d 925, 935 (D.Mo. 1999) (citing Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Pre-emption*, 13 YALE J. ON REG. 255, 303, 327 (1996)).

Here, Plaintiff alleges that Defendants exercised discretion over the plan (i) in choosing which drugs to include in formulary and which retail pharmacies to include in their network, and (ii) in negotiating discounts, rebates, and discounts on behalf of Plaintiff. Further, Defendants controlled the disposition of Plaintiff's assets in that they directed the payment of prescription drug claims; administered and regulated access to plan information and accounting; negotiated for discounts, kickbacks, and rebates; and disbursed (or failed to disburse) such amounts (directly or indirectly) to Plaintiff. Additionally, through their compilation and use of formularies and preferred medication lists, and manipulation of co-payment amounts; Defendants "steered" patients toward certain drugs. In light of Plaintiff's allegations regarding Defendants' discretion and control, re-alleged in support of each of Defendants' state and common law claims, Defendants were acting as ERISA fiduciaries during their purported performance of the disputed acts.

See, e.g., *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (ERISA assigns a number of detailed duties and responsibilities to fiduciaries, including "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."); *Firstier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir. 1994) (ERISA imposes fiduciary status "only if one exercises *discretionary* authority or control over plan *management*, but imposes those duties *whenever* one deals with plan *assets.* "), *cert. denied*, 513 U.S. 871 (1994) (emphasis in original). *C.f. Rowe*, 429 F.3d at 301 (Duty to disclose conflicts of interests and payments from drug manufacturers "are purely ministerial and simply not sufficient for us to find that the PBMs are acting as fiduciaries under ERISA."); *American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F.Supp. 60, 69 (D.Mass. 1997) (Selection of service providers and operation of provider networks has "too tenuous, remote and peripheral" a connection with plan administration to warrant preemption.' ").

COUNT I: ***Breach of Fiduciary Duty- Common Law***

In its claim for breach of fiduciary duty under common law, Plaintiff seeks relief for Defendants' improper acts in their administration and management over the plan and the plan's assets. This claim has a "connection with" an ERISA plan.

First, while New York exercises a traditional state power in adjudicating claims for breach of fiduciary duty, ERISA's legislative history confirms that ERISA's preemption clause applies *at least* to state laws " 'relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan...' " *See Shaw,* 463 U.S. at 99 (citing H.R. 2, 93d Cong., 2d Sess. § 514(a) (1974), *reprinted in* SEN. COMM. ON COMMITTEE PRINT COMPILED BY THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4057-4058 (1976)). *See also, e.g., Parkman,* 439 F.3d at 771-72 ("ERISA preempts state common law tort and contract actions asserting improper processing of a claim for benefits' under an ERISA plan.") (quoting *Thompson v. Gencare Health Sys., Inc.,* 202 F.3d 1072, 1073 (8th Cir. 2000) (internal quotations omitted)); *Hull v. Fallon,* 188 F.3d 939, 943 (8th Cir. 1999) (Where the claims relate to the administration of plan benefits, they "fall squarely within the scope" of ERISA.).

Furthermore, where a state law conflicts with a specific portion of ERISA, it shall be preempted. *Boggs v. Boggs,* 520 U.S. 833, 841 (1997) ("We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase "relate to" provides further and additional support for the pre-emption claim."); *accord Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 439 (8th Cir. 1997). Relevant here, a claim for breach of fiduciary duty under ERISA does not incorporate the same set of duties, rights and remedies as a similar claim asserted under common law. "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection, and the ' "expect[ation] that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.' " *Varity,* 516 U.S. at 497 (quoting H.R. REP. NO. 93-1280, at 302 (1974) (Conf. Rep.))*; Wilbers v. Moneta Group Inv. Advisors, Inc.*, No. 4:06-CV-00005, 2006 WL 1360866, at *4-5 (D.Mo. May 17, 2006).

Accordingly, Plaintiff's claim for breach of fiduciary duty under common law is preempted and **HEREBY DISMISSED *WITH PREJUDICE***. *See, e.g., Painter*, 121 F.3d at 439; *Wilbers,*

at *4-7; *James A. Dooley Associates Employees Retirement Plan v. Reynolds*, 654 F.Supp. 457, 462 (D.Mo. 1987).

COUNT II: ***Deceptive Business Practices***

Plaintiff's claim asserting deceptive business practices re-alleges Defendants' acts and/or omissions in their management and administration of the plan. Despite the unavailability of this specific cause of action under ERISA, the law has a "connection with" an ERISA plan.

First, under New York statutory law, a party alleging injury from the deceptive acts or practices of another in conducting business, or furnishing services, may be entitled to relief. N.Y. GEN. BUS. LAW § 349(a) & (h). Plaintiff's complaint provides that Defendants exercised discretion over the deceptive acts and/or practices alleged, *supra*; and Plaintiff has failed to establish the "violation of any legal duty independent of ERISA." *Aetna*, 542 U.S. at 214. *See* 29 U.S.C. §§ 1104 & 1106 (Fiduciaries are required to act in the best interests of the plan, trace assets, defray reasonable expenses, provide benefits to participants and beneficiaries, and act in accordance with the governing plan documents.).

See, e.g., *Pilot Life*, 481 U.S. at 54 ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."); *Johnson v. U.S. Bancorp*, 387 F.3d 939, 942 (8th Cir. 2004). ("It is well-established that ERISA's civil enforcement provisions are the exclusive remedies for participants seeking to recover benefits under an ERISA plan."); *accord Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989) (A law "relates to" an ERISA plan where a state law provides an alternative cause of action to employees in receiving benefits under an ERISA plan.). *Lopresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997) (holding that "alternative theor[ies] of recovery for conduct actionable under ERISA" are preempted).

Accordingly, Count II is **HEREBY DISMISSED *WITH PREJUDICE***.

COUNT III: ***Breach of Contract***

Plaintiff alleges breach of contract in that Defendants (i) entered into secret agreements with pharmaceutical manufacturers to distort and inflate the prices charged to the plan, (ii) failed to disclose the "secret rebates, discounts and kickbacks [they] usurped from [Plaintiff]," (iii) failed to adequately inform plan participants about their rights under the plan, and (iv) failed to provide

plan sponsors with an accurate accounting.

ERISA expressly requires fiduciaries to act in accordance with the governing plan documents and to refrain from self-dealing. 29 U.S.C. §§ 1104 & 1106. Moreover, it is well-established that ERISA preempts common law causes of action for breach of contract as they relate to an ERISA plan. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 60 (1987); *Parkman*, 439 F.3d at 771; *Johnson*, 387 F.3d at 942; *Walker v. National City Bank of Minneapolis*, 18 F.3d 630, 632 (8th Cir. 1994); *Consolidated Beef*, 949 F.2d at 963; *Wilbers*, at *4-7; *Mathis v. American Group Life Ins. Co.*, 873 F.Supp. 1348, 1356 (D.Mo. 1994); *Board of Trustees of Western Lake Superior Piping Industry Pension Fund v. American Benefit Plan Adm'rs, Inc.*, 925 F.Supp. 1424, 1428 (D.Minn. 1996).

Accordingly, Plaintiff's breach of contract claim is preempted and **HEREBY DISMISSED *WITH PREJUDICE***.

COUNT IV: *Conversion*

In support of its conversion claim, Plaintiff alleges that, in derogation of its rights and the parties' agreement; Defendants exercised dominion and control over the rebates, discounts, and kickbacks which they negotiated, and received, from manufacturers and pharmacies.

Again, ERISA fiduciaries are required to act in accordance with plan documents and in the best interests of plan participants and beneficiaries, and to refrain from self-dealing. *See* 29 U.S.C. §§ 1104 & 1106. Therefore, given Defendants' status during their management and control of plan assets, and their improper conduct in misappropriating the assets or entering into secret arrangements; Plaintiff's conversion claim is precisely the type of claim addressed and preempted by ERISA's remedial scheme. *See* 29 U.S.C. § 1106(b) (ERISA fiduciary shall not (1) deal with plan assets in his own interest, (2) deal with parties whose interests are adverse to the plan's, or (3) receive any consideration from third parties dealing with the plan in connection with a transaction involving plan assets.); *id.* § 1106(a)(1)(A) & (D) (an ERISA fiduciary is prohibited from causing the plan to engage in a transaction which he knows will result in (i) a sale or exchange of property between the plan and a party in interest,[FN8] or (ii) a transfer to a party in interest of any plan assets.).

FN8. Fiduciary or other person providing services to plan. 29 U.S.C. § 1002(14).

Accordingly, Plaintiff's Count IV is **HEREBY DISMISSED *WITH PREJUDICE***. *See also, e.g., Am. Cleaners and Laundry Co. Inc. v. Textile Proc., Serv. Trades, Health Care Prof. and Tech. Employees Intern. Union Local 161*, 482 F.Supp.2d 1103, 1123-24 (D.Mo. 2007); *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F.Supp. 1468, 1487 (D.N.Y. 1983).

COUNT V: *Breach of the Covenant of Good Faith and Fair Dealing*

Next, Plaintiff alleges that Defendants breached the implied covenant of good faith and fair dealing inherent in the parties' contracts. In accord with the Court's analysis regarding Plaintiff's breach of contract claim, ERISA similarly preempts claims arising from the parties' implied agreements. *See Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1136-37 (7th Cir. 1992); *Nevill v. Shell Oil Co.*, 835 F.2d 209, 212 (9th Cir. 1987); *Weiss v. CIGNA Healthcare, Inc.*, 972 F.Supp. 748, 751 (D.N.Y. 1997); *Calif.Digital Def. Ben. Pens. Fund v. Union Bank*, 705 F.Supp. 489, 490 (D.Cal. 1989). Plaintiff's Count V is **HEREBY DISMISSED *WITH PREJUDICE***.

COUNT VI: *Unjust Enrichment*

Lastly, Plaintiff alleges that Defendants' acts, omissions, and/or practices conferred upon them "ill gotten gains" at Plaintiff's expense. Therefore, "equity demands that they account for and make restitution of the benefits they have so unjustly received." As previously stated, ERISA (i) requires fiduciaries to administer an ERISA plan in accordance with plan documents and in the best interests of participants and beneficiaries, and (ii) restricts fiduciaries from self-dealing. Accordingly, Plaintiff's claim has a "connection with" an ERISA plan and is **HEREBY DISMISSED *WITH PREJUDICE***.[FN9] *See American Cleaners*, 482 F.Supp.2d at 1115 (ERISA preempts plaintiff's claim for unjust enrichment).

FN9. Despite the Court's recent [provisional] ruling relating to Plaintiff's unjust enrichment claim (*see* Doc. #274); the amended complaint charges both Defendants with each allegation therein. Consequently, Plaintiff has established the discretion, control, and/or authority of both Defendants.

In light of Defendants' discretion, authority, and/or control over the ERISA plan; the alleged harm to plan participants and beneficiaries stemming from Defendants' mis-management and/or administration of the plan, and Plaintiff's prayer for relief in the form of damages and/or restitution for amounts allegedly misappropriated from the plan; the Court finds that ERISA preempts each of Plaintiff's state and common law claims. *See Van Natta v. Sara Lee Corp.*, 439 F.Supp.2d 911, 917 (D.Iowa 2006) (discussing the " 'unjust and increasingly tangled ERISA regime,' whereby '[v]irtually all state law remedies are preempted but very few federal substitutes are provided.' ") (quoting *Aetna*, 542 U.S. at 222 (Ginsberg & Breyer, J.J., concurring)).

Notwithstanding the abeyant consequences of today's ruling, the Court deems its analysis in line with *Mertens*. That is to say, if Defendants (by virtue of their alleged discretion and control) are ERISA fiduciaries, their liability will be governed exclusively by the regulation and relief devised under ERISA. Conversely, if Defendants are later deemed to have acted in a manner ministerial or peripheral, Plaintiff shall stand without remedy. "[ERISA] is certainly not nonsensical; it allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." *Mertens*, 508 U.S. at 262. The *Mertens* Court reasoned that "[e]xposure to [another] sort of liability [under state or common law] would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Id*. "All that ERISA has eliminated, on these assumptions, is the common law's joint and several liability, for ***all*** direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." *Id*. (emphasis in original). The result being, "in other words, a 'tension between the primary [ERISA] goal of benefitting [sic] employees and the subsidiary goal of containing [employer] costs.' " *Id*. at 262-63 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)). While the Court appreciates ERISA's invasion of a claimant's potential rights under state law; the facts establish that Defendants were ERISA fiduciaries in their management and administration of the plan. Any potential injustice caused by today's finding may only ***properly*** be addressed by the legislature.

B. INDEPENDENT GROUNDS: Legal Sufficiency of Plaintiff's Claims

Having found that ERISA preempts each of Plaintiff's state and common law claims, Defendants' motion to dismiss on independent grounds is **HEREBY DENIED**, as moot.

CONCLUSION

For the reasons outlined above, the Court **HEREBY DECLARES**, **ADJUDGES**, and **DECREES**:

The following claims are **HEREBY DISMISSED *WITH PREJUDICE***:

Count I: Breach of Fiduciary Duty under New York Common Law;

Count II: Deceptive Business Practices;

Count III: Breach of Contract;

Count IV: Conversion;

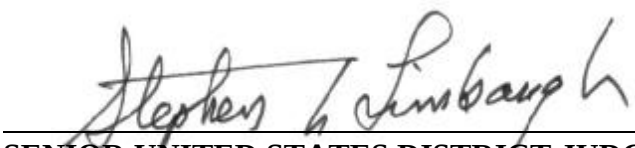
Count V: Breach of the Covenant of Good Faith and Fair Dealing; and

Count VI: Unjust Enrichment.

Plaintiff's claim for Breach of Fiduciary Duty under ERISA has been adequately pled and **SHALL PROCEED TO TRIAL**.

So Ordered.

Dated this 6th day of February, 2008.



SENIOR UNITED STATES DISTRICT JUDGE